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No. 02-1593

IN THE

Supreme Court of the United States

BEDROC LIMITED, LLC; WESTERN ELITE, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA; GALE A. NORTON; BUREAU OF LAND MANAGEMENT; CURTIS TUCKER; UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, ASSOCIATED GENERAL CONTRACTORS OF ALASKA, COLORADO CONTRACTORS ASSOCIATION, MONTANA CONTRACTORS ASSOCIATION, WYOMING STOCK GROWERS ASSOCIATION, AND WYOMING STOCK GROWERS AGRICULTURAL LAND TRUST IN SUPPORT OF PETITIONERS

Ross E. Davies
Counsel of Record
George Mason University School of Law
3301 N. Fairfax Dr., Arlington, VA 22201
Phn: (703) 993-8049; Fax: (703) 993-8124

Donald J. Kochan
University of Virginia School of Law
580 Massie Rd., Charlottesville, VA 22903
Phn: (434) 924-3299; Fax (434) 924-7536
Counsel for Amici Curiae

QUESTIONS PRESENTED

The Pittman Underground Water Act of 1919 ("Pittman Act") authorized patents of up to 640 acres of Nevada land to applicants who discovered and successfully developed underground water sources. Pittman Act patents reserve all "coal and other valuable minerals" to the United States. The questions presented are:

(1) Whether the reservation of "valuable minerals" encompassed ordinary sand and gravel (or other ubiquitous common materials) that were worthless at the time of the patent, but which became marketable decades later as development created markets in reasonable proximity to such sand and gravel; and

(2) If *Watt v. Western Nuclear*, 462 U.S. 36 (1983), calls for a *per se* rule that *all* sand and gravel was reserved on land patented by the federal government in the early 20th century, whether congressional intent would be better served by a rule that such common materials were *not* reserved to the government as "valuable minerals."

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INTERESTS OF AMICI CURIAE[1]

The Associated General Contractors of America ("AGCA") is the largest and oldest of the national trade associations in the construction industry. It is a non-profit corporation formed in 1918 at the request of President Woodrow Wilson. AGCA represents more than 33,000 firms in more than 100 chapters throughout the United States. Among the association's members are more than 7,000 of the nation's leading general contractors, more than 12,000 specialty contractors, and more than 14,000 material suppliers and service providers to the construction industry. AGCA has two chapters and approximately 700 members in Nevada, the state in which this case arose.

AGCA's members engage in the construction of commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities, and multi-family housing units, and they prepare sites and install utilities necessary for housing development. Their projects require and consume vast quantities of sand and gravel and they therefore have a great and continuing interest in the cost and availability of these materials. A significant number of AGCA members also extract sand and gravel on western and other lands. In some instances, these construction contractors are simply self-supplying the materials they need for their projects. In other cases, they also supply sand and gravel to other contractors.

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[1] Letters indicating the parties' consent to the filing of this brief have been filed with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *amici* certify that counsel for a party did not author this brief in whole or in part and that no person other than *amici* made a monetary contribution to the preparation of this brief.

AGCA seeks to ensure that construction contractors can efficiently support the physical infrastructure on which all Americans are heavily dependent for their quality of life. To that end, the association's bylaws require it "to promote fair and honorable dealings with the owners of construction projects ... and with all segments of the construction industry, including architects, engineers, specialty and subcontractors, and suppliers of materials and services."

AGCA's members have found that the cost of transporting sand and gravel is extremely high. Whether a construction project is cost-effective may therefore depend in large part on whether construction contractors can produce or purchase these materials relatively near the project. Where neither sand nor gravel, nor other aggregate, is available at reasonable prices, less infrastructure is likely to be built.

As an *amicus curiae*, AGCA frequently participates in nationally significant cases in state and federal courts, including the Supreme Court. It recently appeared before this Court as an *amicus* in *Adarand Constructors v. Mineta*, 534 U.S. 103 (2001). AGCA also appeared before this Court as an *amicus* supporting the petition for certiorari in this case.

The Associated General Contractors of California ("AGCC") is the AGCA chapter for most of the State of California. AGCC is an independent but affiliated trade association of construction contractors and related firms (including sand and gravel producers) committed to skill, integrity, and responsibility in the improvement of our physical environment. Founded in 1920, AGCC represents more than 1,100 firms, including general contractors, specialty contractors, material suppliers, and other businesses serving the construction industry in California.

AGCC is the voice of California's construction industry, and is committed to improving the performance of its members and the construction industry as a whole, which of necessity includes the procurement of essential materials such as sand and gravel. AGCC members operate in California, as well as in nearby western states such as Nevada. AGCC participated as part of an *amici curiae* coalition supporting this Court's review of this case.

The Associated General Contractors of Alaska ("AGCAK") is a non-profit construction trade association consisting of general contractors, subcontractors, and industry professionals dedicated to improving the professional standards of the construction industry. The AGCAK has been a significant part of the construction industry in Alaska since its establishment in 1948.

The Colorado Contractors Association, Inc. ("CCA") is Colorado's premier construction group. It was established in 1933 and is comprised of more than 370 firms including many second and third-generation family-owned construction businesses. CCA's member base also includes construction support businesses such as financial, insurance and bonding, materials supply, and heavy equipment companies.

The Montana Contractors Association ("MCA") is an association dedicated to being the leader of Montana's construction industry, promoting economic viability by providing complete services to members, including a competent workforce and enhanced image, privatization, and economic development. MCA provides services to its members, promoting profitable business relationships while actively addressing public policy issues affecting contractors, responsibly serving Montana's public needs with integrity.

The Wyoming Stock Growers Association ("WSGA") is a private, non-profit organization established in 1872 for the purpose of protecting and promoting the interests of the livestock industry. Many of WSGA's members own private lands subject to federal mineral interests, and a majority who are patentees or successors-in-interest to patentees under the Stock-Raising Homestead Act, 43 U.S.C. §§ 291 *et seq.* (1976). The mission of WSGA is to serve the livestock business and families of Wyoming by protecting their economic, legislative, regulatory, judicial, environmental, customary, and cultural interests.

The activities of WSGA include: advocating on issues affecting the cattle industry, agriculture, and rural community living of Wyoming; providing members with education regarding beef production, resource management, and policy development, and timely information regarding events in the cattle industry and the activities of the association; and promoting the role of the Wyoming cattle industry in resource stewardship, animal care, and the production of high-quality, safe, and nutritious beef. WSGA also works to inform and educate the public regarding the role of the cattle industry. All of these activities are grounded in the cattle industry's productive and valuable use of private lands that are in many cases affected by federal mineral interests and potentially at grave risk from unwarranted extensions of those interests at the hands of the U.S. Department of Interior. WSGA participated as *amicus curiae* before this Court in *Watt v. Western Nuclear*, 462 U.S. 36 (1983).

The Wyoming Stock Growers Agricultural Land Trust ("WSGALT") is dedicated to Wyoming's ranching and farming heritage. Its goal is to provide agricultural landowners with land conservation options to enhance their business planning to remain productive and independent

today, and better prepared to pass on their traditions to future generations.

WSGA established the trust as a separate legal entity in December of 2000 in response to the growing need within the ranching community to provide voluntary, private sector mechanisms that assist landowners in retaining their land in agriculture and in passing it on to succeeding generations. WSGALT became a federally registered charitable organization in July 2001. It accomplishes its objectives by receiving conservation easements, increasing awareness of tools to maintain ranchlands, and assisting in research into new opportunities to conserve working agricultural landscapes.

SUMMARY OF ARGUMENT

This brief explains why well-settled property and mineral law, the terms of the Pittman Act interpreted in light of this Court's decisions, and sound public policy all weigh in favor of a negative answer by this Court to the first question presented, and an affirmative answer to the second question. The Ninth Circuit's contrary rulings in this case convert an explicit limitation on government mineral interests in lands granted to pioneers under the Pittman Act into an implicit and functionally limitless government power to repossess newly-valuable economic resources once they have been developed on those lands by private parties. The Ninth Circuit's faulty judgment poses a serious threat to vital sand and gravel resources and the property rights of Western landowners, and thus to the accessibility and affordability of public and private development in Nevada and throughout the West. As a result, this Court's interpretation of the words "valuable minerals" in the Pittman Act – words that have a discernible and sensible meaning when read in the context of the general property and mineral law, this Court's decisions,

and the public policies which animated the Pittman Act and still apply today – could have consequences that reach well beyond the proper resolution of this dispute, influencing the development of the West for many years to come.

Moreover, as the Ninth Circuit suggested below, it views its decision in this case as merely another step in establishing the maximal reach of federal control over Western lands on the basis of an over-large interpretation of this Court's decision in the *Western Nuclear* case, one that itself had a rationale that has not stood the test of time and should be overruled. Therefore, this Court's decision in this case has implications not just for the meaning of the Pittman Act and the rights of BedRoc and other property owners subject to that law, but also for the many millions of acres of land subject to more than a dozen similar statutes that govern land ownership throughout the West. Permitting the Ninth Circuit's reading of the Pittman Act, *Western Nuclear*, and the general property and mineral law – as well as that court's non-reading of this Court's other relevant decisions – to run free in this case will only inspire additional governmental efforts in the coming years to acquire through statutory retrospective reinterpretation that which patentees earned and received in years past. A decision to reverse the Ninth Circuit will not only do justice in this case, but will also encourage a return to the established principles of property and mineral law and reasonably certain allocations of property rights relied on by landowners and regulators for most of the 20th century before the Ninth Circuit delivered its unorthodox decision below.

ARGUMENT

I. Background Of Petitioners' Case

The Pittman Act was part of Congress's effort to encourage settlement of the American West through land

grants to those who were willing to lead the way, if only there was some hope of reward for the substantial financial and personal risks associated with prospecting in the Western deserts.[2] The Act authorized permits for individuals to explore for subterranean waters on "unreserved, unappropriated, non-mineral, nontimbered public lands ... in the State of Nevada."[3] A prospector who discovered and successfully developed an underground water source could obtain a patent for up to 640 acres of land. Such a patent reserved to the United States "all the coal and other valuable minerals," and the reserved mineral estate would be "subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal."[4]

Sand and gravel were widespread on these Nevada desert lands in 1940, when the patent issued for the land in dispute here,[5] but there was no market for such materials at that time due to the remote location. *See* Excerpts of Record at 34-35. Location is critical when it comes to determining the value of sand and gravel deposits, for low marginal profits and high transport costs have always made it important that these supplies lie close to their market. Expansion of the city of Las Vegas in the 1990s created a market for gravel in the area. *Id.* at 34-35, 37. Affordable sand and gravel are essential ingredients in urban and suburban growth. Nevada is growing quickly, driven by Las Vegas development that makes it "one of the fastest growing

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[2] *See* 41 Stat. 293-95 (1919).

[3] *Id.*

[4] *Id.* § 8.

[5] *See BedRoc Ltd. v. United States*, 314 F.3d 1080, 1083 (9th Cir. 2002).

cities in America."[6] This growth makes the availability of affordable sand and gravel essential to the continued health of the state's economy.

In this case the Ninth Circuit allocated title to sand and gravel on Petitioners' land to the federal government, based on erroneous applications of the Pittman Act itself, of this Court's 1983 ruling in *Watt v. Western Nuclear*[7] that a gravel deposit in Wyoming was reserved to the United States under the Stock-Raising Homestead Act of 1916 ("SRHA"),[8] and of fundamental principles of property and mineral law

Thus, notwithstanding a statute and precedents indicating that the sand and gravel on the land at issue belonged to Petitioners, the Ninth Circuit has undermined the settled expectations of Petitioners, other Pittman Act patent holders, and holders of patents under numerous other land grant statutes. This Court should reverse the Ninth Circuit's erroneous, overbroad, and dangerous interpretation of statutory mineral reservations.

II. The Ninth Circuit Erroneously Ignored Settled Property And Mineral Law That Presumptively Places Rights To Sand And Gravel In Petitioner, Not The Government

It is a fundamental tenet of property law that conveyances are to be interpreted at the time of the grant in accordance with the intent of the parties.[9] Any other

[6] Patrick Barta, *Acres and Pains: Growing Scarcity Of Land Alters Home Economics*, WALL ST. J., Apr. 15, 2003 at A1.

[7] 462 U.S. 36 (1983).

[8] 43 U.S.C. §§ 291 *et seq.* (1976).

[9] *See* HERBERT HOVENKAMP & SHELDON F. KURTZ, THE LAW OF PROPERTY §6.1 (5th ed. 2001).

interpretation would create shifting private property rights whose security would simply be at the whim of the current market for particular minerals.[10]

With respect to sand and gravel in particular, the widely-accepted background rule bestows mineral rights on the holder of the surface estate. Thus, "[t]he *vast majority of courts* have held for various reasons that gravel is not a mineral estate in general private grants or reservations of minerals."[11] In addition, contrary to the Ninth Circuit,

[10] *See, e.g., Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676, 683 (10th Cir. 1986) ("New BLM views as to mineral reservations arrived at long after a patent issued, or revealed long after a patent issued, cannot change the title the patentee received under the then-prevailing practice and decisions."); *Miller Land & Mineral Co. v. State Highway Comm'n of Wyoming*, 757 P.2d 1001, 1007 (Wyo. 1988) ("Gravel will satisfy this definition [of mineral] if it has the requisite value. And there may be instances wherein a reservation of minerals has been made in past years and wherein the requisite value was present and recognized to be so in the minds of the parties.") (concurring opinion).

[11] *Miller Land & Mineral*, 757 P.2d 1001, 1003 (Wyo. 1988). *See also Heinatz v. Allen*, 217 S.W.2d 994, 997 (Tex. 1949); *Burkey v. United States*, 25 Cl. Ct. 566, 575-76 (U.S. Cl. Ct. 1992) (discussing Colorado's general rule excluding sand and gravel from mineral reservation and citing decisions of other jurisdictions "overwhelmingly to the same effect"); *Farrell v. Sayre*, 270 P.2d 190 (Colo. 1954); *Miller Land & Mineral*, 757 P.2d at 1003 (rejecting request to "follow the emerging law that gravel is a mineral posited in the United States Supreme Court case of *Watt v. Western Nuclear, Inc.*"); *Burkey*, 25 Ct. Cl. at 577 (sand and gravel not reserved); *Rysavy v. Novotny*, 401 N.W.2d 540, 542 (S.D. 1987) (quartzite rock not reserved); *Downstate Stone Co. v. United States*, 712 F.2d 1215, 1219 (7th Cir. 1983) (limestone not reserved where government acquired surface estate from private party). *Western Nuclear* has also been distinguished from cases involving lands patented pursuant to other *federal statutes* in which the scope of the reservation was not

(continued....)

"[m]ost state courts that have addressed the issue have concluded ... that ordinary sand and gravel are part of the surface estate."[12] Thus, in the absence of some contrary expression of intent in the Pittman Act, it is only reasonable to assume that rights to sand and gravel passed to patent holders under that statute, along with other conventional interests.

These fundamental concepts apply with even greater force where Congress grants land and attempts to induce investment through the creation of private property rights. As the *Western Nuclear* dissenters explained, "[i]n recommending 'citizen sovereignty' of the soil, Congress surely did not intend to destroy that sovereignty by reserving the commonplace substances that actually constitute much of

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(continued) . . .

mandated in the statute itself. *See United States v. Hess*, 194 F.3d 1164, 1172 (10th Cir. 1999) (distinguishing owner that acquired lands pursuant to Indian Reorganization Act exchange patent, finding "Congress did not preordain Mr. Brown's surface or subsurface use of [IRA] lands"); *Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676, 681 (10th Cir. 1986) (distinguishing *Western Nuclear* and observing "it cannot be assumed, as the Government does herein, that the surface use was preordained [by Congress]"); *Hess*, 194 F.3d at 1174 (to ascertain meaning of "minerals," court "must, as in *Poverty Flats*, look at the intent of the parties ... as used in the exchange patent at issue"). *See also* John S. Lowe, *What Substances Are Minerals?*, 30 ROCKY MTN. MIN. L. INST. 2-1 (1984); *Miller Land & Mineral*, 757 P.2d at 1003-04 (addressing whether gravel was reserved and commenting "[i]f there is [ ] confusion, we suspect that the [*Western Nuclear*] case is the culprit ... .").

[12] Jean Feriancek, *What Constitutes a Mineral?*, 15-SPG NAT. RESOURCES & ENV'T 261, 279 (2001).

that soil."[13] Here, under the Pittman Act, Congress explicitly set out to induce private citizens to explore and develop the underground water resources of Nevada for the public good and to grant substantial lands "as a reward for [their] labors and expenditures."[14] To now deny rights to sand and gravel, simply as a result of changing local market conditions, would frustrate this intent of Congress to encourage development on Pittman Act lands.

III. The Ninth Circuit's Resort To *Western Nuclear* Should Fail Because It Neglects To Acknowledge The Limited Reach Of That Decision, Account For The Critical Textual Difference Between The SRHA And The Pittman Act, Or Reconcile Other Precedents Of This Court

The Ninth Circuit ignored the settled law and sound principles described in Part II in favor of its own idiosyncratic conversion of this Court's narrow decision in *Western Nuclear* into a broad repudiation of limitations on federal reservations of mineral rights. In *Western Nuclear*, this Court held that under the SRHA, a clause reserving to the United States "all the coal and other minerals" on lands patented under that Act included gravel.[15]

As an initial matter, it is not at all clear that *Western Nuclear* has survived the test of experience. The opinion is an anomaly in public land law and an odd disturbance in private property rights – contrary to longstanding mining and

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[13] 462 U.S. at 71-72 (Powell, Rehnquist, O'Connor, and Stevens, J.J.).

[14] H.R. Rep. No. 66-286, at 1 (1919).

[15] 462 U.S. at 37 (citing 43 U.S.C. § 299).

property law precedents.[16] This Court now has an opportunity to bring its precedents in line with longstanding mineral law and end the confusion by overruling *Western Nuclear* and permitting Western landowners to once again use and conserve their property according to settled expectations.

The most recent evidence of the weakness of *Watt v. Western Nuclear* comes from the United States Court of Appeals for the Tenth Circuit, which recently ruled that gravel is not a "mineral" included in the reservation of federal mineral rights in an exchange patent issued under the Indian Reorganization Act of 1934.[17] Refusing to apply *Watt v. Western Nuclear* in the exceedingly broad manner created by the Ninth Circuit in the case before this Court, the Tenth Circuit relied in part on an important 1956 opinion of the Interior Solicitor that the worth of materials must be evaluated in terms of the economic value of such resources at the time of conveyance and reservation.[18] In light of the

[16] *See, e.g., United States v. Hess*, 194 F.3d 1164 (10th Cir. 1999) (distinguishing *Western Nuclear* and remanding to district court to determine whether gravel was a mineral included in the reservation of an exchange patent issued under the Indian Reorganization Act of 1934); *See also Amoco Production Co. v. Southern Ute Indian Tribe*, 526 U.S. 865 (1999). *See also, e.g.,* Feriancek, *supra* note 12 at 262 ("The *Western Nuclear* decision did not answer the question of gravel ownership on lands patented under statutes other than the SRHA, or as to minerals acquired by the federal government through other means such as land exchange.").

[17] *United States* ex rel. *Southern Ute Indian Tribe v. Hess*, No. 02-1212, ___ F.3d ___, 2003 WL 22664678 (10th Cir.(Colo.), Nov. 12, 2003).

[18] *Id.*, 2003 WL 22664678 at *11-12 (citing U.S. Dep't of the Interior, Solicitor Op. M-36379 at Summary (Oct. 3, 1956)). *See also Western Nuclear*, 462 U.S. at 67 n.11 (Powell, J., dissenting) (citing same opinion of the Interior Solicitor).

Tenth Circuit's sensible skepticism about the utility of *Western Nuclear* as a guide to Western land law, and, at the same time the Ninth Circuit's tendency to treat *Western Nuclear* as a license to grant property rights to the federal government willy-nilly, it is difficult to see what good it does for this Court to permit *Western Nuclear* to remain the law of any land.

Nonetheless, even if this Court chooses to leave in place its ruling in *Western Nuclear,* that case dealt with a broad reservation of "all … other minerals" under the SRHA, while this case involves a more limited reservation under the Pittman Act. And, finally, the Ninth Circuit failed to account for important and relevant decisions of this Court and of the Department of the Interior – decisions reflecting an understanding that land grants of the sort at issue in this case should not be manipulated by bureaucrats or judges to unfairly change the conditions of a deal on which citizens and their government came to terms long ago.

A. The Words "Valuable Minerals" In The Pittman Act Restrict The Government's Mineral Rights, Contrary To The Ninth Circuit's Construction Relieving The Word "Valuable" Of All Meaning

There is a big difference between the statute this Court interpreted in *Western Nuclear* (the SRHA) and the statute this Court is interpreting in this case (the Pittman Act). The SRHA broadly reserved to the federal government "all the coal and other minerals" on patented lands, while in contrast the Pittman Act reserved less – "all the coal and other *valuable* minerals." The Ninth Circuit acknowledged its need

to find a way around the Pittman Act's explicit limitation of the federal reservation to "valuable minerals," if that court was to equate the issues here with the issues in Western *Nuclear*, and thus reach the same result.[20]

The Ninth Circuit's decision hinges on that court's labored and implausible construction of the word "valuable" to mean simply nothing – thereby enabling the court to equate the case before it with *Western Nuclear*. This Court should reject that construction as an unjustified judicial amendment of the Pittman Act.

The court below took two paths. First, it announced that the word "valuable" had no meaning as a restriction of federal mineral rights: "Congress did not intend to convey any mineral rights to patentees under the Act."[21] Second, noting this Court's longstanding insistence that courts avoid needlessly excising words from statutes,[22] the Ninth Circuit also set out to prove that the word valuable could apply to sand and gravel in the Nevada desert before the casinos were built, a proof functionally indistinguishable from the court's initial assertion that the use of the qualifying "valuable" was no qualification at all.

To reach the conclusion that sand and gravel in the Nevada desert in the early years of this century were to the United States "valuable minerals," the Ninth Circuit constructed a definition of "valuable" in the mineral context that can be summarized as a five-step process:

[20] *BedRoc*, 314 F.3d at 1089.

[21] *Id.*

[22] *Id.* (citing *TRW Inc. v. Andrews*, 534 U.S. 19 (2001)).

First, identify a piece of land that contains common mineral materials that the federal government seeks to own – here, Petitioners' land.

Second, identify the particular types of common mineral materials that the federal government seeks to own – here, Petitioners' sand and gravel.

Third, find a document that estimates the dollar value of annual production of those common mineral materials at the time the federal government enacted the relevant statute (here, the Pittman Act), but without regard to where or under what circumstances those production values arose, or whether they had any relationship to the piece of land containing the common mineral materials that the government seeks to own. Here, the Ninth Circuit relied on early 20th century reports on nationwide sand and gravel production. There is no indication that any of the sand or gravel was produced or consumed anywhere near Petitioners' land or even in the State of Nevada, nor is there any indication of whether there was any market in which sand or gravel from Petitioners' land would have had any value, given the high cost of transporting sand and gravel.[23]

Fourth, adopt a multiplier to enlarge the dollar value to purportedly modern proportions. Here, the Ninth Circuit adopted as authoritative a multiplier available at the "How Much Is That Worth Today" web site.[24] The court failed to note, however, the bold type at the top of that web site: "NOTE: Please also see *What is the Relative Value?*, which presents five different ways (including the CPI) that can be used to compare the worth of a United States Dollar for the

[23] *Id.* at 1088-89.

[24] *Id.* at 1089.

years 1789-2002."[25] Nor did the court below bother to report the cautionary note on the web site that,

> Determining the *relative* value of an amount of money in one year compared to another is more complicated than it seems at first. There is no single "correct" measure, and economic historians use one or more different series depending on the context of the question.
>
> Most indices are measured as the price of a "bundle" of goods and services that a representative group buys or earns. Over time the bundle changes; for example, carriages are replaced with automobiles, and new goods and services are created such as cellular phones and heart transplants.[26]

Thus, it appears that while the Ninth Circuit was unwilling to acknowledge that the value of particular items must be evaluated in context, the very experts on whom the Ninth Circuit relied for its dollar valuation recognize the importance of context, including the relevance of regional data.[27]

Fifth, announce that the resulting dollar amount is large enough to show that the common mineral materials contained in the piece land that the federal government seeks to control were valuable at the time the land passed into private hands.[28]

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[25] *See* http://eh.net/hmit/ppowerusd/.

[26] *See* http://eh.net/hmit/compare/.

[27] *See* http://www.eh.net/hmit/unskilledlabor/source.htm.

[28] *BedRoc*, 314 F.3d at 1089-90.

Thus, for example, if sand and gravel sales totaled roughly $35 million in the United States in 1919, then sand and gravel were "valuable minerals" in the Nevada desert, even if sand and gravel were all the eye could see for miles around, and the whole point of prospecting for water was to convert some small patches of the vast expanse of sand and gravel that was perceived to be useless at that time into something perceived to be useful. Likewise, by the Ninth Circuit's reasoning, if block ice sales totaled $10 million in the United States in 1919, then block ice was a "valuable mineral" near the residences of Americans everywhere, including those residing on ice shelves off the northern coast of the Alaska Territory.

The question, then, after the Ninth Circuit's decision below, is what does *not* count as a "valuable mineral" owned by the federal government? Ice in the Alaskan Arctic, sand in the Nevada desert of 1919 – under the Ninth Circuit's interpretation of the Pittman Act, everything is valuable everywhere as long as there is a market for it somewhere. This is doctrine in a state of dilatatio ad absurdum – an exercise that deprives of all meaning the restrictive term "valuable" in the Pittman Act's restriction of federal mineral rights to "valuable minerals" and instead expands it to embrace everything that is not animal or vegetable. It cannot serve as a rational mechanism for defining the boundaries between private and governmental property rights under the Pittman Act or any statute, unless the purpose of statutory interpretation in this context is always to transfer to the federal government that which it desires.

B. This Court's Decisions In *Amoco* And *Leo Sheep* Trump The Ninth Circuit's Strained Reading Of *Western Nuclear*

Since the 1983 decision in *Western Nuclear*, this Court has had at least one opportunity to again consider whether

the federal government should be able to revise its land grants based on later developments that make formerly useless minerals valuable in the present. It has rejected that supposition.

In 1999, in *Amoco Production Co. v. Southern Ute Indian Tribe*,[29] this Court held whether a deposit is valuable when a statutory mineral reservation becomes effective should not later change due to a fluctuating market. The common conception at the time of enactment determines the meaning of the law.

The *Amoco* Court addressed whether the reservation of "all coal" under the Coal Lands Acts of 1909 and 1910 included coalbed methane gas ("CBM gas") located within coal formations. This Court held that "the *common conception* of coal at the time Congress passed the 1909 and 1910 Acts was the solid rock substance that was the country's primary energy resource."[30] According to the Court:

> The question is not whether, *given what scientists know today*, it makes sense to regard CBM gas as a constituent of coal but whether Congress so regarded it in 1909 and 1910. In interpreting statutory mineral reservations like the one at issue here, we have emphasized that Congress "was dealing with a practical subject in a practical way" and that it intended the terms of the reservation to be understood in "their ordinary and popular sense."[31]

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[29] 526 U.S. 865 (1999).

[30] *Id.* at 874 (emphasis added).

[31] *Id.* at 873 (emphasis added).

At the time the Pittman Act was passed and the patent at issue was granted, sand and gravel in rural Nevada were not considered valuable minerals. The scope of property rights granted should not be allowed to change today simply because of alterations in markets and technology. As this Court explained in *Leo Sheep Co. v. United States*:

> Generations of land patents have issued without any express reservation of the right now claimed by the Government. Nor has a similar right been asserted before. ... This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations ... .[32]

The Department of the Interior itself has acknowledged that value should be determined at the time a patent is obtained, *not* at some later date. This interpretation should stand. When interpreting an analogous 1926 statutory mineral reservation, the Department concluded that only deposits valuable at the time of conveyance were reserved;

> Deposits of sand and gravel in lands allotted or patented under the act of June 3, 1926 (44 Stat. 690), which can be shown *as of the date of the allotment or patent* to have a definite economic value by reason of the existence and nearness of a market in which they can be sold at a profit, are reserved.[33]

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[32] 440 U.S. 668, 687 (1979) (citations omitted).

[33] U.S. Dep't of the Interior, Solicitor Op. M-36379 at Summary (Oct. 3, 1956) (emphasis added) (cited in *Western Nuclear*, 462 U.S. at 67 n.11 (Powell, J., dissenting)).

The Solicitor explained that this rule does *not* limit the reservation of "other minerals having known *intrinsic mineral qualities and values*," but governs only reservations of "low-value non-metallic mineralized substances such as sand and gravel which are normally found in quantity over widely distributed areas."[34] The Department of the Interior thus recognized that sand and gravel were not intrinsically valuable minerals and would only be reserved when they had economic value at the time of conveyance.

If taken to its logical conclusion, the Ninth Circuit's decision would, in fact, make almost all surface rights granted under the Pittman Act subject to federal property, permission, and control. The Ninth Circuit's rationale could leave Pittman Act and other Western surface landowners "with the dubious assurance that only the dirt itself could not be claimed by the Government. It is not easy to believe that Congress intended this result."[35] Indeed, if the government could find data showing that there was market somewhere in the United States for dirt, and the web site multiplier were high enough, even dirt would not be safe. Dirt would also be at risk if the land were used for agriculture, since crops on Pittman Act lands can only grow by draining minerals from the soil. These minerals are thus "valuable" because they contribute to the health of the crops. If the Ninth Circuit's broad rationale is sustained, then these crops could also be federal property – having extracted valuable minerals from the soil. Surely, this was not the intent of Congress. Surely, this Court should reverse a ruling that would lead to such a result.

[34] *Id.* at 4 (emphasis added).

[35] *Western Nuclear*, 462 U.S. at 61 (Powell, J., dissenting).

The Ninth Circuit's decision adversely affects private property rights. The Ninth Circuit's erroneous interpretation of *Western Nuclear* and neglect of other relevant authorities may well govern property rights not just on those Pittman Act lands directly at issue, but on all lands patented under similar general statutory mineral reservations under at least thirteen federal statutes requiring the reservation of all minerals in certain conveyances by the United States.[36] This Court should resolve the Pittman Act issues involved here in a manner that not only gives meaning to the term "valuable minerals" and comports with property and mineral law of long standing, but also cuts off the potentially devastating precedential effect of this case at the pass before the Ninth Circuit's broad ruling is used to alter the rights of landowners throughout the West.

IV. The Ninth Circuit's Ruling Harms The Vital Trade In and Control Over Sand And Gravel

When the federal government claims ownership of sand and gravel, landowners lose dominion and control over those resources and their property as a whole. It matters who owns the sand and gravel resources on these western lands for a wide range of users and a wide range of interests.

A variety of land and resource uses are precluded. Landowners cannot extract those resources for necessary uses on their own property – for structural buildings, pits, reservoirs, roadways, and other uses critical to the operation of their lands – when they are deemed federally owned. Landowners cannot sell the extraction rights or extract the sand and gravel themselves for the commercial market. Federal ownership also minimizes their ability to control the

[36] *See* 3 Rocky Mtn. Min. Law Found., AMERICAN LAW OF MINING § 9.05[2] (2d ed. 2002).

means and methods of extraction. Landowners are removed from the decision making process related to *if, where, when, and how* extraction will take place, risking damage to the surface and a reduction in resale values. The impact from this loss of control can be devastating to homesteaders, farmers, ranchers, and other property owners. Many of WSGA's members already know the pain that can be inflicted by broad interpretations of statutory mineral reservations from the direct impact of this Court's decision in *Watt v. Western Nuclear*.

There is another critical loss to landowners when dominion over sand and gravel is deemed federal – the ability to choose to leave the resources in place and the land undisturbed. Increasingly, landowners in the West have an interest in creating conservation easements. WSGALT was created to assist this process in Wyoming, and similar organizations exist throughout the country. Conservation easements are a valuable method to protect the environment and a means by which landowners can diversify their surface use. If a landowner controls the rights to the resource, he can forgo extraction in favor of the conservation easement. If he does not own such rights, the incentives to create the easement disappear and an environmentally positive outcome is precluded.

Landowners suffer when the government claims ownership of common sand and gravel, but so do the extraction industry and downstream market consumers. If left standing, the Ninth Circuit's decision will impair the sand and gravel industry in the western United States and its ability to contribute to the nation's economy. This industry serves an important role in all forms of economic activity, including the activities of and transactions with the members of *amici*.

Sand and gravel are among the most common of earth's geological materials. Sand and gravel are common materials for fills and as a base for pavements, including interstate highways, and local mine roads, private ranch, farm and other roads, as well as other structures. When combined with cement binders, sand and gravel become the principal ingredient in an unusually strong and long-lasting construction material – concrete – whether used in its plastic state and placed in forms, or precast as pipe, block and other structural components. When combined with asphalt, sand and gravel become the aggregate forming the major element of a widely used paving material, asphaltic concrete.

Sand and gravel are the most common materials used as aggregate. In fact, in some sections of the country these materials are the only available source of aggregate that can be provided economically. As natural deposit materials, sand and gravel are highly useful resources but *only* when they are relatively close to those locations where aggregates may be needed. Wherever communities, homes, and industrial operations have been established, sand and gravel are necessary as aggregates. The national annual consumption of aggregates including sand and gravel is more than ten tons (21,000 pounds) per capita. Of course, the producers of sand and gravel must abide by governmental regulations, including environmental controls.

One unique aspect of sand and gravel operations lies in the economics of its extraction. Due to transportation costs, it is critical for the extraction industry and consumers to utilize sand and gravel deposits near the market for these materials. Sand and gravel are bulky, heavy and relatively lost cost products. As such, these products can absorb little increase in hauling distance from extraction site to consumer without a prohibitive increase in delivered product cost. As a result, the majority of such extraction sites are close to the point of

product use (usually within a metropolitan area where the demand for land and other uses is pressing and acute, like the ever-expanding areas in Nevada).

The inability of industry, landowners, and others to use sand and gravel locations which are subject to other uses – or taken outside of private ownership – can only lead to increasing extraction and construction costs. As one example, "The fundamental problem of the [sand and gravel] industry, therefore, is that of securing the right to continue to produce sand and gravel for the construction industry at locations that are economically feasible."[37]

Compliance with current land use and other environmental controls – many supported by the aggregate mining, and construction industries – makes aggregate extraction an activity accepted by communities as a responsible contributor to the economy. Nevertheless, there are still difficulties in securing the right to produce sand and gravel because of local zoning ordinances, state acts, and federal controls affecting the industry's surface mining activities. The substantial capital investment required for modern sand and gravel plants is already a risky undertaking for the prospective producer without increased costs associated with federal property controls such as those created by the Ninth Circuit's ruling at issue here.

This investment will become all the more difficult (and, indeed, prohibitive in many cases) if the federal government can now claim ownership to millions of acres of deposits in the western United States. Substantial past investments, reasonably made on the expectation of private ownership,

[37] Nat'l Stone Sand and Gravel Association, *The Sand and Gravel Industry: A Valuable Resource – A Vital Construction Material*, available at www.nssga.org/whoweare/sandgravel.htm.

will be threatened; and many future investments and production activities may be thwarted.

Traditionally a matter of state and local control, aggregate operations that *can* obtain federal authorization to extract the sand and gravel deposits that the Ninth Circuit considered "reserved" to the United States will be subject to a whole host of new federal rules and regulations. Many of these will be duplicative of responsible controls already in place at the state and local level, and all of them will unnecessarily increase the costs of an activity with an already low marginal profit.

The imposition of federal ownership will require any private party seeking to gain access to federal "reserves" to deal now with the costly requirements of, and the delays associated with, the National Environmental Policy Act,[38] the Endangered Species Act,[39] the National Historic Preservation Act,[40] and many other federal controls – not to mention simply the cost of negotiating an extraction authorization from the federal government and fair market value payments. This will require environmental assessments, species consultation, and cultural resource assessments, among others.

Moreover, surface owners who have federally owned sand and gravel reserves on their lands will have their dominion disrupted because they will be required to permit outsiders with federal sand and gravel licenses on to their land for extraction. As a result, where federal minerals exist on private lands, extraction companies must conduct many

[38] 42 U.S.C. §§ 4321 *et seq.*

[39] 16 U.S.C. §§ 1531 *et seq.*

[40] 16 U.S.C. §§ 470 *et seq.*

types of environmental assessments on the private lands, particularly cultural resource surveys. Many of WSGA's members have faced this situation – one that brings significant inconvenience and costs to surface owners.

The federal government would become the principal party in common aggregate operations and discourage the extraction and use of these resources. This outcome does not reflect the intent of the Pittman Act nor our general public land policies which traditionally supported private ownership and dominion over lands conveyed.

In the case of Nevada, more than 83 percent of the state's land is already owned outright by the federal government.[41] Now, as a result of the Ninth Circuit's misguided application of this Court's own dubious opinion in *Western Nuclear*, long-settled expectations of many owners of those Western lands that are in private hands are at risk. Absent this Court's intervention to correct the Ninth Circuit's dangerous detour away from settled principles and sound policies of property, mineral, and federal land law, there may be little left in the law to govern the reach of the federal government when it seeks to expand its share in the ownership of estates split between private surface rights and federally-reserved mineral rights.

The Ninth Circuit has all but announced, and not for the first time, an irrebuttable presumption in favor of the federal government under the Pittman Act and other land grant laws, explaining that the court is merely enforcing what it views as the "full reservation of mineral rights [that] was the policy in

[41] *See* U.S. Dep't of the Interior, PUBLIC LAND STATISTICS at Table 1-3 (2001).

place at the time of the Act's passage."[42] Alas, the Ninth Circuit's entrenched view makes little sense in light of Congress's selection of different terms to govern land grants under different laws, as the lower court's judicial excision of the word "valuable" from the Pittman Act makes clear.

Finally, while the Ninth Circuit's view of the Pittman Act in particular and the land grant laws in general makes little of the essential underlying commitments between the United States and the pioneers of an earlier generation to make the West a productive, livable part of this country in return for the opportunity to share in the prosperity of the settled lands,[43] this Court has recognized that such a socially beneficial deal is not to be discarded lightly. As this Court has held, when Congress:

> offers to individuals or to corporations as an inducement to undertake and accomplish ... works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.[44]

The Ninth Circuit's ruling, if allowed to stand, would make citizen landowners subservient to the federal government rather than serve the purposes of the Pittman Act to encourage development in the West.

[42] *BedRoc*, 314 F.3d at 1086-87 (citing *United States v. Union Oil Co. of California*, 549 F.2d 1271 (9th Cir. 1977)).

[43] *Id.* at 1085.

[44] *Leo Sheep*, 440 U.S. at 683 (citation omitted).

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

Ross E. Davies
Counsel of Record
George Mason University School of Law
3301 N. Fairfax Dr., Arlington, VA 22201
Phn: (703) 993-8049
Fax: (703) 993-8124

Donald J. Kochan
University of Virginia School of Law
580 Massie Rd., Charlottesville, VA 22903
Phn: (434) 924-3299
Fax: (434) 924-7536

Counsel for Amici Curiae

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